No. 6112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY, (a corporation organized and existing under and by virtue of the laws of the State of West Virginia),
Appellant,

vs.

FREDA DALY, as administratrix of the estate of Stewart Daly, deceased,
Appellee.

REPLY BRIEF FOR APPELLANT

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The appellee in her brief raises the uoint that the appellant waived his motion for a non-suit and exceptions thereto by putting in evidence. That is not the rule in the State of Montana. In this State if the defendant does not stand upon his motion for a non-suit but introduces evidence in support of his answer, the only risk he assumes is in supplying defects in the plaintiff's case and if his evidence does not in some way bolster the plaintiff's evidence, then he still is entitled to all the rights and benefits of his motion for a non-suit.

Waterson vs. Hill, 84 Mont. 549, 276 Pac. 948.

Under the Conformity Act, the trial of an action at law in Federal Courts must correspond as nearly as may be to the State practice, and in a case involving a motion for a non-suit, the Supreme Court of the United States held that the practice on the motion for a non-suit must conform to the State practice.

Barrett vs. Virginia Railway Company, 250 U. S. 474, 63 Law Edition, 1092.

Neil Bros. Grain Co. vs. Hartford Fire Insurance Co. 1 Fed. (2 d.) 904.

Shank, vs. Shoshone and Twin Falls Water & Power Co. 205 Fed. 833.

Of course there are many decisions by Federal Courts that a motion for a non-suit is waived by the defendant putting in evidence, but such cases are based upon a State statute, entirely different to Montana. As an example of such cases, see *Cole vs. Mendenhall,* 240 Fed. 641.

Section 9387, Revised Codes of Montana is as follows:

"WHAT DEEMED EXCEPTED TO. Every order, ruling, and decision of every kind and nature made and entered by any court, judge, or referee, and every verdict, finding, decree, or judgment of a court is deemed excepted to, and it shall not be necessary to ask for or note an exception but nothing herein contained shall be deemed to dispense with the necessity of making objections, nor to dispense with the preparations of a bill of exceptions in all cases in which the same is required by law ,nor shall this act dispense with the making and settlement by sections 9370 and 9371 of this code. This act shall not affect the procedure for the settlement of instructions, save that no exception need be noted to any in-

struction, nor to any order of the court relating thereto."

Hence we submit that no right was waived on the motion for a non-suit and the exception to the order denying it was not waived, by introduction of evidence by defendant. The appellee also claims that a defect in the complaint was waived by a failure to object to the court's instructions. Under the practice in this State, an objection to the sufficiency of the complaint may be raised at any time and by section 9136 of the Revised Codes of Montana it is so provided.

OBJECTIONS—WHEN DEEMED WAIVED

"If no objection is taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

When an objection has once been made, it does not have to be thereafter repeated.

Ferrat vs. Adamson, 53 Mont. 172, 163 Pac. 122.

The appellant raised the sufficiency of the complaint by a demurrer. The order of the court in overruling the demurrer is the first assignment of error. This objection having been once raised it continues throughout the trial. But even assuming the appellee is right in her contentions in regard to the non-suit and as to the sufficiency of the complaint, nevertheless, the evidence is wholly insufficient to

support any verdict. This has been fully discussed in our first brief.

The appellee on page 5, of her brief, claims that the appellant admits that Stewart Daly was a servant. The appellee's allegations in its answer means and is to the effect that Stewart Daly was a co-servant of his own employer, David Mottleson. We have not in our answer in any manner or at all admitted that Stewart Daly was a servant or employee of the appellant. Our sole allegation is that he was the co-servant of his employer, David Mottleson, and the pleading can not be otherwise construed.

It is respectfully submitted that the judgment should be set aside and the action dismissed.

Dated, Butte, Montana,
September 12, 1930.

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